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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 609

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation,
Petitioners,

v.

J. DONALD DUNCAN as Trustee, *et al.*,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, MOTION FOR LEAVE TO FILE AND SUPPORTING BRIEF

HERMAN E. RIDDELL,
HERBERT J. JACOBI,
Counsel for Petitioners,
60 Broadway,
New York 4, N. Y.

October 11, 1946.

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IN THE

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CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation, *Petitioners,* *v.* J. DONALD DUNCAN as Trustee, *et al.*, *Respondents.*	No.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes Herbert J. Jacobi, counsel for the Petitioners above named, and respectfully moves this Court, to the extent that the accompanying petition seeks relief pursuant to Section 262 of the Judicial Code (28 U. S. C. § 377), for leave to file the petition for certiorari, hereto annexed, under said Section 262, directed to the United States Circuit Court of Appeals for the Second Circuit, to review an order of that Court, entered July 18, 1946, more particularly described in the petition, and for such other and further relief as may be just and proper.

HERBERT J. JACOBI,
Counsel for Petitioners,
60 Broadway,
New York 4, N. Y.

October 11, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation, Petitioners, *v.* J. DONALD DUNCAN as Trustee, *et al.*, Respondents.	No.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Charles A. Dana, Sir James Dunn, John W. Hubbard, and Newcombe C. Baker, acting as a Common Stockholders' Committee, Equitable Office Building Corporation, respectfully pray that writs of certiorari issue (1) under Section 240(a) of the Judicial Code to review the order of the United States District Court for the Southern District of New York entered on July 16, 1946, denying petitioners' application for an order to show cause why the instant proceedings under Chapter X of the Bankruptcy Act (52 Stat. 883; 11 U. S. C. §§ 501-676) should not be dismissed upon the payment by the Debtor of its matured debts, and why consummation of the Trustee's Plan of

Reorganization of the Debtor should not meanwhile be stayed, an appeal from which order is now pending in the United States Circuit Court of Appeals for the Second Circuit and (2) under Section 240(a) and, in the alternative, Section 262 of the Judicial Code to review the order of the United States Circuit Court of Appeals for the Second Circuit, entered on July 18, 1946, denying petitioners' application for a stay of consummation of said Plan pending the determination of petitioners' appeal from said order of the District Court.

A certified copy of the pertinent portions of the record in the instant proceedings, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38, paragraph 1, of the Rules of this Court.

Opinions

Neither the District Court nor the Circuit Court of Appeals rendered an opinion.

In granting a stay herein, Mr. Justice Reed rendered an opinion which is printed at pages 362-369 of the record.

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. § 347(a)) and, in the alternative, under Section 262 of the Judicial Code (36 Stat. 1162; 28 U. S. C. § 377).

Summary Statement of the Case

The matter herein involved arises in proceedings under Chapter X of the Bankruptcy Act.

The Debtor in said proceedings is a New York corporation which owns and operates the Equitable Building, a

large office building located at No. 120 Broadway and covering an entire block in the downtown New York City financial district (R. 283).*

The Debtor's funded debt and capital stock consists of the following (as at April 30, 1946) (R. 327-328, 330):

Funded Debt:		
First Mortgage		$15,880,543.35
6% Gold Mortgage Bonds, due May 1, 1943	$ 3,000.00	
Accrued and unpaid interest thereon through May 1, 1946	990.00	3,990.00
Thirty-five year 5% Sinking Fund Debentures due May 1, 1952	$4,754,000.00	
Accrued and unpaid interest thereon through May 1, 1946	1,069,650.00	5,823,650.00
		$21,708,183.35
Capital Stock:		
Authorized, issued and outstanding		862,098 shares

All defaults in respect of the First Mortgage have heretofore been cured (R. 327-330).

On April 10, 1941, the Debtor, being unable to pay its debts as they matured, although not insolvent, filed a voluntary petition for reorganization in the District Court for the Southern District of New York. J. Donald Duncan was thereupon appointed as Trustee herein and Henry E. Miller was appointed as additional Trustee (R. 1).

On December 4, 1945, a plan of reorganization (hereinafter called the Trustee's Plan) was approved by the District Court (R. 175) and, on May 13, 1946, said Plan was confirmed (R. 261). The time to appeal from the approval

* References herein to the record are to page numbers.

and confirmation of the Trustee's Plan had expired and orders directing consummation of said Plan had been entered (R. 370, 268, 273), but said Plan had not been consummated, at the time of the filing with the District Court of petitioners' application herein, and consummation of said Plan is now stayed by order of Mr. Justice Reed, pending this Court's action on the instant petition (R. 360).

The Trustee's Plan (R. 181) was predicated upon a finding by the District Court as set forth in the order dated December 4, 1945 approving said Plan (R. 175) that the fair value and then present worth of the land and building at 120 Broadway, New York, was $21,375,000, and the fair value and then present worth of all other assets net to the Debtor was $1,205,761.17, making a total of $22,580,761.17 (R. 177). It provided, among other things, that (a) the First Mortgage of approximately $16,000,000 should remain undisturbed, (b) the $3,000 principal amount of Second Mortgage Bonds (but not the $990 of accrued interest thereon) should be paid in cash, (c) the $4,754,000 principal amount (plus approximately $1,000,000 of accumulated interest) of Debentures should be exchanged for $2,852,400 principal amount of new income bonds (convertible into 456,384 shares of new capital stock) and 475,400 shares of new capital stock, and (d) the presently outstanding 862,098 shares of capital stock of the Debtor should be exchanged for 86,209.8 shares of new capital stock.

On July 16, 1946, prior to consummation of the Trustee's Plan by a transfer of the Debtor's properties and other assets to a newly formed Maryland corporation and the issuance of $2,852,400 of convertible income bonds and 561,609.8 shares of capital stock of such corporation, petitioners obtained *a proposal which, for the first time since the inception of the reorganization proceedings, afforded the Debtor an opportunity to pay off its matured debts in full and regain control of its property.* City Investing Company, a financially responsible New York City realty firm, made an offer, backed by a tender of certified checks for

$517,258.80, (a) to underwrite an offering by the Debtor *pro rata* to its existing stockholders of 862,098 shares of additional capital stock at $6 per share (or an aggregate of $5,172,588), after reducing its presently outstanding capital stock from 862,098 shares to 86,209.8 shares, and (b) if the District Court should so desire, pending the completion of the new stock issue, to purchase for cash up to $5,200,000 of short-term Trustee's certificates on mutually acceptable terms to be agreed upon.

It was apparent to petitioners that this offer, if accepted, and the new financing provided for therein, if carried through, would provide the Debtor with sufficient funds, together with its other available funds, to enable it (i) to pay off in full the principal and the accrued interest on the Second Mortgage Bonds and Debentures (R. 104), thus leaving the First Mortgage as the only outstanding funded indebtedness, (ii) to pay all reorganization expenses, and (iii) to provide adequate working capital for the conduct of its future business. This would substantially improve the position of the stockholders over what their position would be if the Trustee's Plan were consummated, and would result in the Debtor's having a substantially stronger financial structure, by eliminating all debt except the First Mortgage.

Under the Trustee's Plan, the existing stockholders would have retained, in a corporation burdened with complicated restrictions of the plan as to management, voting and dividends (R. 188-189, 194-206), only 15.3% of the equity (above the First Mortgage and new convertible bonds aggregating $18,732,400 principal amount) or, in the event of conversion of the new bonds, only 8.4% thereof (above the Mortgage of $15,880,543). Under the new offer, however, these stockholders would become entitled, if choosing to subscribe for new shares, to the entire equity except for the underwriting interest. If not choosing to subscribe, they would at the least receive the 8.4% of the equity, above the Mortgage, accorded them under the Trustee's Plan and in

addition might well realize through the sale of rights up to $50 for each share owned by them. Mr. Justice Reed alluded to some of these advantages in his opinion of August 6, 1946 (R. 368).

Because of these obvious benefits to the stockholders, petitioners forthwith, on July 16, 1946, applied to the District Court for an order to show cause why the reorganization proceedings should not be dismissed upon the completion of the proposed financing and the payment of all debts (except the First Mortgage) of the Debtor and why a stay of consummation of the Trustee's Plan should not be granted pending the determination of petitioners' application (R. 100, 103).

The aforesaid application was denied on the same day, without hearing and without opinion* (R. 101, 116), the District Court obviously having acted in the belief (contended by petitioners to have been an erroneous belief) that as a matter of law it was without power to entertain petitioners' application after the Trustee's Plan had once been approved and confirmed and the time to appeal therefrom had run, even though the Plan had not yet been consummated (R. 138).

On the following day (July 17, 1946) an appeal was duly taken by petitioners to the Circuit Court of Appeals for the Second Circuit (R. 170) and an application was made to that court** for a stay of consummation of the Trustee's Plan pending the determination of the appeal (R. 382). This application for a stay was denied without opinion on July 18, 1946. Also on July 17, 1946, petitioners duly appealed to the Circuit Court of Appeals from the order of the District Court directing consummation of the Trustee's Plan (R. 171).

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* The opinion of Judge Knox (R. 99) related to the earlier denial of a petition by two stockholders seeking amendment of the Plan rather than dismissal of the proceedings.

** That court consisted of Circuit Judge Learned Hand, together with District Judges Coxe and Goddard. The denial was by endorsement of Judges Coxe and Goddard only. (R. 392)

On August 2, 1946, petitioners, the Debtor, and two individual stockholders severally applied to Mr. Justice Reed for a stay of consummation of the Trustee's Plan pending the filing with this Court of applications for certiorari and action thereon (R. 362), and on August 6, 1946, Mr. Justice Reed granted such a stay (R. 360).

There has been no hearing or determination with respect to this matter in the Circuit Court of Appeals, other than in connection with petitioners' application to that Court for a stay, which, as stated above, was denied.

Questions Presented

(1) In proceedings under Chapter X of the Bankruptcy Act, is the right of a Debtor to pay off its creditors and redeem its properties cut off by the approval and confirmation by a District Court of a plan of reorganization, once the time to appeal therefrom has expired, or does such right of redemption survive until the plan has been consummated?

(2) In proceedings under Chapter X of the Bankruptcy Act, does a District Court have power to entertain an application for a dismissal of the proceedings upon the payment by the Debtor of its matured debts, after a plan of reorganization has been approved and confirmed by such District Court and the time to appeal therefrom has expired, but before such plan has been consummated?

(3) In proceedings under Chapter X of the Bankruptcy Act, may a District Court refuse to entertain an application, made before consummation of the reorganization, to dismiss the proceedings upon the payment by the Debtor of its matured debts?

(4) Was there reversible error on the part of the United States District Court for the Southern District of New York in denying petitioners' application for an order

to show cause why the proceedings should not be dismissed upon the payment by the Debtor of its matured debts, and in thus denying petitioners a hearing upon the merits of their application?

(5) Was there reversible error on the part of the United States Circuit Court of Appeals for the Second Circuit in denying petitioners' application for a stay of consummation of the Trustee's Plan of Reorganization pending a determination of petitioners' appeal from the denial by the United States District Court for the Southern District of New York of their application for an order to show cause why the proceedings should not be dismissed upon the payment by the Debtor of its matured debts?

Reasons for Granting the Writs

A. As to the District Court Order of July 16, 1946.

1. This case presents questions of unusual importance in the interpretation and administration of Chapter X of the Bankruptcy Act which have not been, but should be, decided by this Court. Practical considerations depending upon such a decision include: Do stockholders or creditors, after confirmation but before consummation, have the risk of profit or loss and consequently the right to benefit from increases in value, increases which are especially prevalent today and appear in many properties in reorganization? Should precedence be given to an owner's equity to redeem his property or, on the other hand, to the welfare of new investors calculating prospective profits on the basis of a plan which has been confirmed but not consummated? An early authoritative decision of these questions by this Court is of pressing importance, not only to the parties to this proceeding and to the hundred of holders of securities of the Debtor, but also to the numerous other debtors which are presently in proceedings under Chapter X, to the holders of their securities, to the United States District Courts

in the supervision of such proceedings and the administration of the Bankruptcy Act, and to the Securities and Exchange Commission in the conduct of the functions with which it is charged under Chapter X of said Act.

2. The implications to be derived from cases in the Circuit Court of Appeals which touch upon the questions presented are confused and uncertain. *Country Life Apartments* v. *Buckley*, 145 F. (2d) 935 (C. C. A. 2d, 1944), *In re 1934 Realty Corporation*, 150 F. (2d) 477 (C. C. A. 2d, 1945).

3. The effect of unanticipated changes of economic conditions prior to consummation, such as the offer of City Investing Company which was not before the Court when the Plan was confirmed, has not been finally determined by this Court. *R. F. C.* v. *Denver R. G. W. R. Co.*, U. S. , 90 L. Ed. 1134, 1148 (1946), *Ecker* v. *W. P. R. Co.*, 318 U. S. 448, 505-509 (1943).

4. The decision of the District Court in denying petitioners' application without a hearing was clearly erroneous and not in accord with the principles enunciated by this Court when analogous situations have been presented. *Milwaukie and Minnesota Railroad Company* v. *Soutter*, 69 U. S. (2 Wall.) 510, 521-2, (1864); *Wright* v. *Union Central Life Insurance Co.*, 311 U. S. 273, 280-1, (1940); *Wayne United Gas Co.* v. *Owens-Illinois Glass Co., et al.*, 300 U. S. 131, 136-7, (1937).

For the foregoing reasons, the issue of certiorari before the decision of the United States Circuit Court of Appeals for the Second Circuit is clearly in order.

B. As to the Circuit Court Order of July 18, 1946

The decision of the Circuit Court of Appeals in denying petitioners' application for a stay of consummation of the Trustee's Plan pending a determination of the appeal to that Court should be reviewed for the further reason that, under the circumstances existing in this case, such decision was

so clearly erroneous as to require immediate correction in order that the integrity of the judicial process of review may remain unimpaired and the rights of numerous persons may not be jeopardized. Incalculable and irreparable harm and havoc would be caused to the Debtor, to the present holders of securities of the Debtor, to prospective investors, and to the public generally, if the Trustee's Plan were to be consummated, the properties of the Debtor were to be transferred to a new corporation, outstanding debentures and stock of the Debtor were to be exchanged for convertible bonds and stock of a new corporation, new bonds were to be converted into new stock, and new bonds and stock were to be freely and widely traded in on the public stock exchanges and over-the-counter markets, and thereafter petitioners were to be sustained on their appeals and an unscrambling of all these transactions were to be required in order to restore the *status quo ante*. Under these circumstances, it is not too strong a statement that the failure to issue a stay amounts to the countenancing of a misuse of the judicial process under the Bankruptcy Act by permitting the issuance and public distribution of deceptive securities. On the other side of the argument, there has been no showing as to any harm which might be caused to the appellees or to anyone else by a stay of consummation of the Plan until the issues which have been raised on the instant appeals may be disposed of. All of the equities, therefore, weigh overwhelmingly in favor of such a stay—to the point where the failure of the Circuit Court of Appeals to grant the stay was a clear abuse of discretion.

Conclusion

The District Court has erroneously interpreted the Bankruptcy Act upon a point of great importance in its current administration and upon which this Court has not made, but should make, a prompt authoritative decision. The want of a stay pending the determination of appeals would permit an intolerable situation to be countenanced by the processes of the Federal courts. For these reasons certiorari should be granted.

Respectfully submitted,

HERMAN E. RIDDELL,

HERBERT J. JACOBI,

Counsel for Petitioners,
60 Broadway,
New York 4, N. Y.

October 11, 1946.

BRIEF IN SUPPORT OF THE PETITION

POINT I

The case involves an important question in the construction of the Bankruptcy Act which has not been but should be decided by this Court.

As is dramatically illustrated by the facts in the instant case, very important property rights in reorganization proceedings, running into hundreds of thousands and, perhaps, millions of dollars, depend upon precisely when new interests vest or old interests are cut off during the process of effecting a reorganization. This court has not ruled upon that question, under the present Act.

The urgent need for guidance from this court on this point is illustrated by two apparently inconsistent decisions by the Circuit Court of Appeals for the Second Circuit: *Country Life Apartments* v. *Buckley,* 145 F. (2d) 935 (1944), and *In re 1934 Realty Corporation,* 150 F. (2d) 477 (1945).

In the *Country Life* case, *supra,* proposals to change a plan of reorganization, submitted prior to confirmation, were rejected by the court on the stated ground that "time for offering substitute plans expired with approval of the trustee's plan; and proposals offered thereafter could only be in the nature of a modification of such approved plan", although, in fact, the court had found that the proposals were not fair, feasible or equitable.

In the *1934 Realty* case, *supra,* the same court held that an amendment to a plan should have been allowed after confirmation and after the time to appeal from the order of confirmation had expired. In a petition for certiorari from that decision it was urged (p. 10) that the Court had erred

> "in holding that after adjudication of petitioner's status and the confirmation of a plan, where con-

summation required only the preparation, execution and delivery of formal documents specified in the plan, and neither the adjudication, nor the order of confirmation can be appealed from, amendments may be approved which adversely affect petitioner's status, over petitioner's objections."

The petition was denied (326 U. S. 734 (1945)).

POINT II

The decisions of this Court in analogous situations appear to be at variance with the decision of the District Court from which petitioners have appealed in this case and, in any event, that decision is contrary to the provisions of the Act and violates the basic principles for protecting the equity of redemption.

Although your petitioners' application was denied without opinion by the District Court, that court stated from the Bench "I simply denied the application * * * there manifestly could not be a determination on the merits" (R. 116) and in remarking on the denial of a similar petition of the Debtor, it was "a question of time" and the order of confirmation was "in effect" a sale cutting off the "right to redeem" (R. 138).

1. The Act itself shows that it is upon *consummation* of a reorganization rather than *confirmation* that debts are discharged and the interests of stockholders terminated.

Sections 221-226 and 236 of Chapter X of the Bankruptcy Act (52 Stat. 897-899; 11 U.S.C.A. §§ 621-628, 636), are set forth in the appendix hereto.

Section 221 provides that the judge shall confirm a plan if satisfied that certain conditions have been met.

The pertinent portions of Section 222 provide:

> "A plan may be altered or modified, with the approval of the judge * * * before *or after its confirma-*

> *tion* * * *. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. * * *" [Emphasis supplied.]

Thus the tentative character of an order of confirmation is explicitly embodied in the Statute.

Section 223 provides that persons who have previously accepted a plan shall be deemed bound by modifications if failing to reject the changes.

The significant provisions of Section 224 are that:

> "Upon confirmation of a plan—
>
> "(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or are allowed or are allowable; * * *."

That Section, although seemingly giving finality to any confirmed plan, must be construed in connection with Section 222, *supra*, which permits changes after confirmation, even if adversely affecting the interests of creditors or stockholders, and with Sections 226, 228 and 236, discussed *infra*. It must therefore be regarded as referring to the binding effect of a plan as finally amended and consummated. To do otherwise would make the Sections of the Act inconsistent with each other, an intention it is not reasonable to attribute to the framers of the legislation.

Section 225 deals with certain liquidated claims.

Section 226 provides in part:

> "The property dealt with by the plan, *when transferred* by the trustee to the * * * corporation pro-

> vided for by the plan, * * * shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, * * *." [Emphasis supplied.]

Here again it is emphatically shown that the consummation of a plan by "transfer" of property constitutes the effective moment when claims are cut off and rights are vested.

Section 227 authorizes the court to direct certain action necessary for the consummation of a plan. Finally, Section 228 provides:

> "*Upon the consummation* of the plan, the judge shall enter a final decree—*
>
> "(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;
>
> "(2) discharging the trustee, if any;
>
> "(3) making such provisions by way of injunction or otherwise as may be equitable; and
>
> "(4) closing the estate." [Emphasis supplied.]

The order contemplated by the foregoing Section of the Statute quite evidently is that which was intended by the legislature to cut off the equity of redemption. Should Section 224, *supra*, give that foreclosing effect to a mere order of confirmation, the provisions of Section 222, *supra*, for subsequent amendment, even though adversely affecting the interests of creditors, and stockholders as well as the provisions of Sections 226 and 228, for terminating the interests of the debtor and its stockholders, would be surplusage and could have no effective place in the statutory scheme.

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* The order of July 8, 1946, "order of consummation" (R. 273) certainly is not such an order as is authorized by the quoted section of the Act. It is, of course, merely an order in aid of a consummation which has not yet been brought about.

The provisions of Section 236 throw further light on this question of interpretation. That Section provides, in part, that:

> "If * * * a confirmed plan is not consummated, the judge shall—
>
> * * * * * *
>
> "(2) where the petition was filed under section 128 of this Act, [as was the case in the instant proceeding (R. 1)] after hearing upon notice * * * an order either adjudging the debtor a bankrupt * * * or *dismissing* the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders." [Emphasis supplied.]

This Section, in explicitly contemplating the possibility of dismissing a proceeding after a plan has been confirmed but before it has been consummated, gives further emphasis to the clear intent of the Statute and the error in holding that an order of confirmation in and of itself is a sufficient ground upon which to deny an application for dismissal of a reorganization proceeding.

2. Analogous authorities show that the statute was not intended to give finality to an order of confirmation.

In construing a similar provision of the predecessor statute (§ 77B of the Bankruptcy Act, 48 Stat. 912, 11 U. S. C. § 207) the court expressly stated that an order confirming a plan of reorganization does not operate as a discharge of the debtor from its debts but that "confirmation of a plan of reorganization is but a step in the administration of the debtor's estate * * * " (*Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160, 166 (1936)). See also *Wright* v. *City National Bank & Trust Co.*, 104 F. (2d) 285, 287 (C. C. A. 6th, 1939); *In re Deep Rock Oil Corporation*, 113 F. (2d) 266 (C. C. A. 10th, 1940); Finletter, *The Law of Bankruptcy Reorganization*, pp. 662-664; Gerdes, *Corporate Reorganizations* (1936), Section 1153.

3. Analogous decisions of this court afford the utmost protection to the right of redemption.

In *Milwaukie and Minnesota Railroad Company* v. *Soutter,* 69 U. S. (2 Wall.) 510 (1864) a bill was brought to foreclose the mortgage on the property of the railroad. After the amount of the debt had been passed upon by this court, the railroad offered to pay the full amount due, and the court below refused the proposal. In reversing the order of the lower court, this court said (pp. 521-522):

> "* * * The complainants are seeking a foreclosure of a mortgage with a view to make their debt. The owner of the equity of redemption in the mortgaged premises comes forward and offers to pay this debt, or all of it that is due, provided his property, which is in the custody of the court, shall then be restored to his possession. The right of the owner to this order is, under ordinary circumstances, very clear, and a refusal by the court to give him this right would seem to call for the revisory power of this court, when the whole case is before it, on the record brought here by appeal from a final decree.
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> "* * * While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment or the discharge of a receiver for the mortgaged property, very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the Circuit Court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the Circuit Court. It is a right which the party can claim; and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. *A refusal is error—judicial error—which this court is bound to correct when the matter, as in this instance, is fairly before it.* That the order asked for by appellants should have been granted, seems to us very clear." [Emphasis supplied.]

In *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273 (1940) this court held that under Section 75(s)(3) of the Bankruptcy Act (49 Stat. 943, 11 U. S. C. § 203(s)(3)) a farmer's right to redeem his property existed despite the earlier application of a secured creditor for public sale, and although the statute was ambiguous on the question. This court stated (pp. 280-281) that the "important remedial right" of redemption could not be cut off prior to actual disposal of the property save by express legislative enactment.

POINT III

Failure of the Circuit Court of Appeals to grant a stay of consummation, pending review, should be corrected by this Court as an obvious abuse of discretion.

But for the stay granted by Mr. Justice Reed (R. 360) it is abundantly clear that the reorganization of the Debtor would by now have been consummated (R. 118-121) notwithstanding the pendency of appeals which, if successful, might have necessitated disentangling the situation thus created so as to restore the *status quo ante*.

The debenture holders have urged before the District Court that if the plan should be consummated, further rights of the Debtor and its stockholders would be cut off, regardless of the outcome of the pending appeals. If the contentions of the debenture holders are correct, the necessity of a stay to protect the Debtor's equity of redemption and the petitioners' rights to have their appeals heard, is obvious.

If, however, as petitioners contend, consummation of the plan would not cut off the rights of the Debtor and its stockholders but would be subject to rescission, a stay is nevertheless imperative. Should the plan be consummated, $2,850,000 face amount of convertible income bonds and 561,610 shares of common stock in a new corporation would forthwith be publicly distributed to the holders of the outstanding debentures and common stock of the Debtor. Since the common

stock presently outstanding is listed on the New York Stock Exchange and such stock and the debentures are the subject of active trading, the new securities would, no doubt, be immediately widely distributed throughout this country, in Canada and in England, and would continue no change hands rapidly. Innocent purchasers would trade in such securities without actual knowledge of the possibility of a rescission. Securities ought not to be publicly distributed when there is a known possibility that they may be subject to rescission. The processes of the federal courts should not be used for the purpose of creating such a deceptive situation.

The power of this court to review and correct the failure of the Circuit Court of Appeals to grant a stay, is clearly established. *Landis* v. *North American Co.*, 299 U. S. 248 (1936); *Porter* v. *Dicken*, U. S. 90 L. Ed. 959 (1946).

In *Landis* v. *North American Co., supra,* this court granted certiorari to the United States Court of Appeals for the District of Columbia to review a decision on special appeal which reversed orders of the District Court for the District of Columbia granting a stay of proceedings in two cases involving the constitutionality of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79). In reversing the decree of the Court of Appeals and remanding the case to the District Court this court stated, through Mr. Justice Cardozo (p. 254):

> "* * * At the very least there was a likelihood, and indeed almost a certainty, of confusion and embarrassment. In such circumstances the call is plain for a decision that will mark with greater clearness the bounds of power and discretion. We granted certiorari that this result might be attained."

In *Porter* v. *Dicken, supra,* certiorari was directed to the Circuit Court of Appeals for the Sixth Circuit to review its refusal to issue an order prohibiting the eviction of the tenant, pursuant to the Emergency Price Control Act, under the processes of a State court. Concerning the granting of

certiorari this court said, through Mr. Justice Black (pp. 960-961):

> "* * * The Administrator made this application in the Circuit Court of Appeals, but it was denied, thus removing all obstacles to eviction of the tenant. The Circuit Court of Appeals has not heard this case. In order to prevent eviction of the tenant the Administrator sought and obtained from Mr. Justice Reed an injunction pending final disposition of this case in this Court and applied for certiorari directly to this Court under § 240(a) of the Judicial Code, 28 USCA § 347(a), 8 FCA title 28, § 347(a) which authorizes us to grant certiorari 'either before or after a judgment or decree by such lower court.' We were prompted to bring the District Court's judgment directly to this Court for review by reason of the close relationship of the important question raised to the question presented in Porter *v.* Lee, Nos. 1116, 1117, decided this day [—— US ——, ante, 956, 60 S Ct ——]."

Accordingly, even if this court should not wish to consider the important substantive issues involved prior to a determination thereof by the Circuit Court of Appeals, it should grant certiorari in respect to the denial by that court of a stay and, without setting the case for argument, direct that court to issue a stay, pending its determination of the pending appeals. See *Ex Parte United States,* 319 U. S. 730 (1942).

It is respectfully submitted that the writs should be allowed.

HERMAN E. RIDDELL,

HERBERT J. JACOBI,

Counsel for Petitioners.

October 11, 1946.

APPENDIX

Sections of Chapter X of the Bankruptcy Act

Article XI—Confirmation and Consummation of Plan

Sec. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such officers, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

Sec. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or

modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

SEC. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

SEC. 224. Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

SEC. 225. Where the claims or stock specified in paragraph (4), clause (b), of section 224 of this Act are objected to by any party in interest, the objection shall be heard and summarily determined by the Court.

SEC. 226. The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

SEC. 227. The court may direct the debtor, its trustee any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

SEC. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

* * * *

SEC. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

(1) where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.